

FAMILY FIRST

Additional Comments

Provisions of the Trade Practices Legislation Amendment Bill (No.1) 2007

FAMILY FIRST is convinced that the *Trade Practices Act* needs to be strengthened to restore fair trading and competition to Australian markets. There is a question as to whether the Government's proposed changes are adequate.

FAMILY FIRST introduced its *Trade Practices Amendment (Predatory Pricing) Bill 2007* because of a concern that anti-competitive conduct like predatory pricing can drive small businesses out of the market and that small businesses are particularly vulnerable because of their limited resources.

Fair competition will help to ensure the lowest prices for families.

Small business has been waiting for the Government's *Trade Practices Legislation Amendment Bill (No.1) 2007* for more than three years since the Senate Economics References Committee recommended action.

The Government's *Trade Practices Legislation Amendment Bill (No.1) 2007* has support from many, but not all small businesses. There is also concern and reluctant support from many groups representing big businesses and those involved in trade practices law.

The Fair Trading Coalition representing 30 small business member groups states that, while some of its members want section 46 strengthened further, it:

... supports amendments to the *Trade Practices Act* which seek to strengthen and clarify the operation of sections 46 and 51AC [and that] ... predatory behaviour by large businesses is a matter of significant concern to the Members of the Fair Trading Coalition and the FTC supports the introduction of specific measures into the *Trade Practices Act* to address predatory, and in particular predatory pricing, behaviour.²

In addition, the Coalition suggested that an important issue that must be addressed is "creeping acquisitions", where markets become highly concentrated not by one-off large purchases, but by small purchases shop by shop that do not attract the attention of government regulators.³

2 Submission 21 (Fair Trading Coalition), page i.

3 Submission 21 (Fair Trading Coalition), page ii, iii.

A number of significant small business groups such as the Council of Small Business of Australia (COSBOA) and the National Association of Retail Grocers of Australia (NARGA) did not make submissions to the inquiry, but COSBOA and NARGA have stated their support for the Government's bill in media releases.⁴

COSBOA and NARGA have also indicated they want the Government to go further with reforms than the current bill.⁵

Not all groups or individuals representing small businesses support the Government's bill. The Southern Sydney Retailers Association declared the amendments "meaningless"⁶ while University of New South Wales Associate Professor Frank Zumbo stated that he did not see any merit in the Government's bill.⁷

Professor Zumbo argued the *Trade Practices Act* needed to be amended because it does not include definitions of 'substantial market power', nor of 'take advantage', but the Government's bill does not do this:

Section 46 is intended to stop firms with substantial market power from taking advantage of that power for an anticompetitive purpose. In order for there to be a breach of section 46, the firm must have substantial market power as defined by the courts or the legislation, if that is appropriate.

As a result of a series of High Court decisions a firm will not have substantial market power unless it has the power to raise prices without losing business to rivals. This test—the ability to raise prices without losing business to rivals—has become the key test for substantial market power. It is highly restrictive, as few, if any, firms would have the ability to raise prices without losing business to rivals ... This means that section 46 is currently not operating as intended by parliament ... So, unless the concept of substantial market power is appropriately defined, section 46 will remain ineffective ...

There is a second threshold issue of whether the firm has taken advantage of its substantial market power. Once again as a result of a series of High Court decisions, that test of 'take advantage' is also an onerous and restrictive test which basically comes down to the proposition that if a firm could engage in the same conduct with or

4 NARGA Urges Swift Passage of Trade Practices Reforms, NARGA Media Release, 20 June 2007; Win for Small Business in the Trade Practices Act, COSBOA Media Release, 19 June 2007.

5 Crowe, D, Look what I do for you, PM tells small business. *Australian Financial Review*, 3 July 2007, page 4; Trade Practices Act Just the Beginning! COSBOA Media Release, 3 July 2007.

6 Submission 15 (Southern Sydney Retailers Association), page 2.

7 Associate Professor Frank Zumbo, Committee Hansard, 27 July 2007, page 11.

without market power then engaging in that conduct is a 'taking advantage' for the purposes of section 46.⁸

There is a notable divide in evidence given between those who are concerned about the effect of the High Court's recent decisions on making the legislation ineffective and those who support the current situation.

For example, the Business Council of Australia stated that "... it is not clear that the High Court's position on section 46 is incorrect and our preference would be that no additional regulation be imposed through changes to the *Trade Practices Act* ... we believe that the current legislation is effective."⁹

One submission suggested the High Court's decision on the Boral case was correct and that action other than changes to the *Trade Practices Act* might be of more help to small businesses, such as "training subsidies, research grants, town planning."¹⁰

Groups representing big businesses gave grudging support to the Government's bill.

The Business Council of Australia "... believes that amendments to section 46 are not required and indeed would be detrimental ... [but] with a view to limiting any adverse consequences flowing from amendments, the BCA is prepared to accept changes that seek to clarify and codify the existing legislation, noting the risks ...".¹¹

The Australian National Retailers Association declared a similar reluctance for change¹² as did Coles¹³. Woolworths declared "no major objections" to the Government's bill, apart from concerns about the predatory pricing provision.¹⁴

A number of submissions argued that the Government's bill meant little practical change to the *Trade Practices Act*. For example, Addisons Lawyers said section 46 does not need change and that "many of the amendments to section 46 proposed in the Government's *Trade Practices Legislation Amendment Bill (No. 1) 2007*, whilst not objectionable, are simply a re-statement of the current law and add little, if anything to the state of jurisprudence on the issue."¹⁵

8 Associate Professor Frank Zumbo, Committee Hansard, 27 July 2007, page 5.

9 Ms Cilento, Business Council of Australia, Committee Hansard, 27 July 2007, pages 14, 17.

10 Submission 6 (David Lieberman and Associates), page 2.

11 Submission 11 (Business Council of Australia), page 2.

12 Submission 16 (Australian National Retailers Association), page 4-5.

13 Submission 4 (Coles Group), page 1.

14 Submission 10 (Woolworths Limited), page 1, 2.

15 Submission 23 (Addisons Lawyers), page 3.

The Law Council of Australia also argued there should be no change to section 46, but recognising there is political will for change, generally supports the Government's changes.¹⁶

FAMILY FIRST believes the *Trade Practices Act* must be strengthened to protect small business by ensuring fair competition. Small businesses are vital for competition, which ensures the lowest prices for families.

FAMILY FIRST introduced the *Trade Practices Amendment (Predatory Pricing) Bill 2007* to give small businesses much needed protection from predatory pricing, by ensuring competition and fair trading. Fair competition will help to ensure the lowest prices for families.

FAMILY FIRST acknowledges that there are significant issues yet to be addressed to ensure fair competition, including creeping acquisitions, defining substantial market power, defining take advantage, unilateral variation of contracts and 'take it or leave it' contracts.

Senator Steve Fielding
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